

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1167

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 21, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct (decision # 81447). Claimant filed a timely request for hearing. On November 12 and 26, 2019, ALJ Wyatt conducted a hearing, and on November 27, 2019 issued Order No. 19-UI-140464, concluding that the employer discharged claimant, but not for misconduct. On December 16, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EMPLOYER’S WRITTEN ARGUMENT: The employer submitted written arguments on December 16, 2019 and December 20, 2019. EAB did not consider the employer’s December 16 written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). EAB considered the employer’s December 20 written argument.

The employer asserted in its written argument that Order No. 19-UI-140464 did not consider adequately the employer’s evidence provided in November 12, 2019 hearing, arguing that “everything [the employer] testified to [on November 12, 2019] had been forgotten by the [November 26, 2019] hearing.” Employer’s Written Argument. However, EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

The employer also argued that its “overwhelming evidence and written statements from the various department heads” showed that claimant was discharged for misconduct. Employer’s Written Argument. However, the record does not support the employer’s argument due primarily to the second-hand, “hearsay,” nature of the evidence provided, and the employer’s apparent failure to warn claimant of the specific conduct that violated its expectations.

The employer presented no evidence at hearing of disciplinary warnings given to claimant from when he began work on August 31, 2018 until his annual review on June 28, 2019. In his annual review, the

employer's off-site corporate manager rated claimant's performance as "developing" in the category of "treats people with respect [and] . . . inspires the trust of others . . ." Exhibit 1 at 30. A rating of "developing" meant that claimant's conduct "did not consistently meet expectations [and required claimant to] improve the overall level of performance within a reasonable period of time." Exhibit 1 at 28. Claimant was not given the lower rating of "unacceptable," which would require immediate improvement. Exhibit 1 at 28, 30. The specific comments from the corporate manager regarding claimant's overall performance were that claimant needed to develop better relations with his staff, improve his anger management, address personnel matters in a "professional, supportive, non-confrontational manner," and work to cover shifts as needed. Exhibit 1 at 30. Claimant understood the employer expected him to manage his anger and improve his relationships with his coworkers. Claimant received no disciplinary warnings after his annual review.

There is no dispute that multiple employees complained to the corporate manager and the assistant general manager about claimant yelling at them or even throwing items in anger. Except for the assistant general manager, however, none of the employees who witnessed the alleged incidents involving claimant testified at hearing. The testimony from the corporate manager regarding specific incidents upon which she based her decision to discharge claimant were entirely hearsay, consisting of written statements from employees or "double hearsay" in the form of written statements regarding statements made to the declarants. Although hearsay is admissible in unemployment benefit hearings, written statements or statements that do not come from a firsthand witness may be less persuasive because the statements are not made under oath and the other party, here the claimant, cannot cross-examine the witness.

The testimony from the assistant general manager, who worked with claimant four days per week, did not show by a preponderance of the evidence that claimant failed to control his anger with employees at work. The assistant general manager described claimant as "very cordial" to her, except for one occasion when he "lashed out" at her, and immediately apologized. Exhibit 1 at 18. Nor did the assistant general manager provide firsthand testimony of incidents that she witnessed showing that claimant did not follow the guidance from his annual review and failed to control his anger, address personnel matters in a "professional, supportive, non-confrontational manner," or work to cover shifts when necessary. *See* Exhibit 1 at 30.

Claimant denied yelling at employees and throwing things, and testified that he worked to fill in shifts whenever necessary. Claimant also provided context for and denied allegations contained in the written, hearsay allegations from employees. The assistant general manager asserted, in writing, that claimant yelled and made hand motions toward an employee and fired her "on the spot," because she was crying. Exhibit 1 at 18. Claimant testified persuasively that he had counselled the employee before, and that he discharged her only after she began to use foul language toward him and threaten him physically during the meeting. Without having witnessed the incident, the assistant general manager asserted in writing that claimant mistreated an employee who failed to clean a room that had been marked as clean. Claimant denied having ever yelled at the employee. Without having witnessed the incident, the assistant manager alleged that claimant behaved in a frustrated manner toward an employee when claimant had to do payroll, and made the employee stay late to complete payroll. Claimant denied he was frustrated about payroll, and testified that the employee willingly worked overtime to assist claimant with completing payroll in a timely manner. Claimant provided the only firsthand testimony

about an incident regarding a safety issue in the laundry room, and denied acting in an angry, inappropriate manner.

The employer has the burden to prove misconduct in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means the employer must present evidence establishing that it is more likely than not that claimant engaged in willful or wantonly negligent misconduct. In this case, the evidence is no better than equally balanced about claimant's alleged misconduct. Absent a reason to disbelieve claimant, or find that he was generally not a credible witness, his testimony has at least as much weight as, or more weight than, the employer's hearsay and double hearsay. In sum, the employer's hearsay did not outweigh claimant's firsthand testimony denying the conduct that could be a conscious violation of the employer's expectations. The employer therefore failed to establish that claimant's discharge was for misconduct.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the order under review is **adopted**.

DECISION: Order No. 19-UI-140464 is affirmed.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: January 16, 2020

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. See ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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